

EXHIBIT B



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April 3, 2020

Via Email

Jay Olin
Director, Division of FOIA Analysis—C
Department of Health & Human Services
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mailstop C5-11-06
Baltimore, MD 21244-1850

Re: FOIA Request No. 112520197031 (submitted Nov. 22, 2019)

Dear Mr. Olin:

I write with reference to our November 22, 2019 request for records made on behalf of DaVita Inc. under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). The Control Number of the request is 112520197031; the PIN is FQ7L.

Our pending request seeks all comments that were submitted on the Proposed Rule entitled *Medicare Program; Medicare Secondary Payer for Disabled Active Individuals*, 55 Fed. Reg. 8,491 (Mar. 8, 1990), that resulted in the Final Rule, *Medicare Program; Medicare Secondary Payer for Individuals Entitled to Medicare and Also Covered Under Group Health Plans*, 60 Fed. Reg. 45,344 (Aug. 31, 1995). According to the Final Rule, the agency “received 36 timely letters of comment from employers, insurance companies, law firms, actuarial firms, individuals, associations (two business and one medical), and beneficiary rights organizations.” 60 Fed. Reg. at 45,349. We requested copies of all 36 letters of comment.

Although we received your December 4 letter denying expedited processing, we have received no response from the agency to our underlying request for records, which has been pending for nearly 90 working days.

We ask that the agency furnish the requested records as soon as possible. As explained in our initial request, these records are relevant to ongoing litigation. To be useful in that litigation, we must have them promptly.

As you know, FOIA generally gives agencies 20 working days to respond to FOIA requests. 5 U.S.C. § 552(a)(6)(A). Your agency’s failure to comply with the statutory deadline triggers our right to file a civil action to order production. *Id.*



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§ 552(a)(4)(B), (6)(C); *see Pollack v. DOJ*, 49 F.3d 115, 118-19 (4th Cir. 1995) (“[W]hen an agency fails to comply in a timely fashion with a proper FOIA request, it may not insist on the exhaustion of administrative remedies unless the agency responds to the request before suit is filed.”). FOIA also provides for the reimbursement of attorney fees and costs incurred by the requester if the action is successful. 5 U.S.C. § 552(a)(4)(E). And none of FOIA’s enumerated exemptions cover public comments filed during an agency rulemaking process. *See id.* § 552(b).

Accordingly, please promptly send copies of the 36 requested letters of comment, in PDF format if possible, to the email address listed below. If your response (or at least a plan for timely production) is not forthcoming, we will pursue our legal remedies to obtain the documents. Again: none of FOIA’s exemptions apply to these documents.

Sincerely,

By /s/ John P. Elwood

John P. Elwood

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